IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	)	
	)	
	)	
vs.	)	**C.R. No. 0412003456**
	)	
MACK K. SMITH,	)	
	)	
Defendant.	)	

Submitted December 23, 2005
Decided June 14, 2006

Carole E.L. Davis, Esquire, Deputy Attorney General.
Eric G. Mooney, Esquire, counsel for Defendant.

DECISION ON STATE'S APPEAL

Pending before this Court is an appeal by the State of Delaware ("State") from a decision by the Justice of the Peace Court ("J.P. Court") suppressing evidence in favor of the defendant, Mack K. Smith ("Defendant") because it found that the arresting officer did not have probable cause to arrest. This Court set a schedule for briefing on the State's appeal. After reviewing the briefs provided, the Court finds and determines as follows outlined below.

PROCEDURAL BACKGROUND

The Defendant was arrested for committing a violation of 21 *Del. C.* § 4177(a), Driving Under the Influence ("DUI"), and for committing a violation of 21 *Del. C.* § 4169, Speeding, on November 27, 2004. The State filed the Information in J.P. Court. Thereafter, the court scheduled the motion to suppress and trial for hearing on April 20, 2005. At the hearing, the court granted the Defendant's motion to suppress, and the State certified that the evidence was

essential to the prosecution of the case, in accordance with 10 *Del. C.* § 9902(b). However, the court did not dismiss the case at the conclusion of the hearing. Instead, upon further inquiry by the State via letter on May 6, 2005, the court properly dismissed the case on May 24, 2005. The State timely filed its appeal pursuant to 10 *Del. C.* § 9903(c) on June 3, 2005.

STATEMENT OF FACTS

Trooper Mark Little ("Officer") stopped the Defendant on State Route 26 ("SR 26"), west of Dagsboro, Delaware, at 2:52 p.m. on November 27, 2004. The Officer testified that SR 26 has portions that curve and wind and portions that are straight. The Officer stated that he observed and stopped the vehicle as it traveled on a long, straight stretch of the roadway in the opposite direction that the Officer was traveling. Just prior to stopping the Defendant, the Officer observed his vehicle passing several other vehicles. According to the Officer's radar, the Defendant's vehicle was speeding, thus, the Officer stopped the Defendant, who appropriately pulled his vehicle over to the shoulder of the roadway. Upon approaching the vehicle and informing the Defendant that he had stopped him for speeding, the Officer observed that the Defendant had rosy cheeks, bloodshot eyes and that he omitted a moderate odor of alcohol, however, the Defendant spoke well and he appeared to have no trouble producing his license and registration. The Defendant admitted to the Officer that he had been speeding and that he had consumed approximately two beers earlier in the day.

Upon making his observations, the Officer administered a number of routine field sobriety tests to determine whether the Defendant was driving under the influence. First, the Officer administered the alphabet test, wherein the Defendant did not begin or end at the instructed letters and he recited other letters out of order. Second, the Officer asked the Defendant to count backwards from 100 to 85. The Defendant failed to stop at the appropriate number. Next, the Officer had the Defendant perform a finger dexterity test, which the Defendant

successfully completed. Thereafter, the Officer asked the Defendant to exit his vehicle, which he did without any visible problem.

Once the Defendant was out of his vehicle, the Officer administered the horizontal gaze nystagmus test ("HGN"), a test on which he had received training during his education with the police academy in 1995, and as a field officer. Additionally, in 2001, the Officer became a certified HGN instructor, which enabled him to assist in instruction at the academy and a special event devised to educate certain members of the legal community. At the hearing, the Officer testified as to how the HGN test is administered, signals that the administrator looks for while conducting the test, and what factors other than alcohol consumption might create nystagmus in the subject, including strobe lights, rotating lights and rapidly moving traffic within close proximity. Furthermore, the Officer testified that when he performed the HGN test on the Defendant, he observed six out of six clues. On cross examination, the Officer admitted that while looking for nystagmus at maximum deviation, which was the second part of the three part test, he only caused the Defendant's eye to be held at the maximum deviation position for two to three seconds, rather than four seconds, which is required by the NHTSA manual. Additionally, the Officer acknowledged that the NHTSA manual states that the HGN test is only validated when it is administered in the prescribed fashion. The Officer also stated that strobe lights, rotating lights and some moving traffic in close proximity where all present when he administered the test.

After conducting the HGN test, the Officer then administered the walk and turn test. Although it is preferred that the test be conducted on a painted line, the Officer had the Defendant complete the test on the side of the road for safety reasons. Thus, the test was administered in an area, which the Officer described as grassy, with a slight slope designed for drainage purposes. According to the Officer, the slight grade did not affect the results of the test. The Officer described the weather as "windy and clear" at the time of the stop. While the Officer

explained the test to the Defendant, he observed that the Defendant was unable to maintain his balance while standing with one foot in front of the other. When the Defendant completed the walk and turn test, the Officer perceived that the Defendant took ten steps instead of nine, and he took one large step instead of a series of small steps to make the turn, as instructed. The Defendant accurately took a second series of nine steps back to his original starting point.

Next, the Officer administered the one leg stand test. At that time, the Defendant informed the Officer that one of his feet was weaker than the other. Thus, the Officer suggested that he complete the test using his stronger foot for balance. The Officer observed that the Defendant raised his arms for balance, swayed, and put his foot down at different points throughout the test. Lastly, the Officer administered a portable breath test ("PBT") on the Defendant. Although the J.P. Court permitted such evidence, the State never established the results of that test.

After the court admitted the foregoing evidence, it ruled that the Officer lacked probable cause to arrest. In its decision, the court relied heavily on its personal knowledge of the roadway where a number of the field sobriety tests were administered to find that the area was not an acceptable place to administer the tests.

DISCUSSION

An appeal by the State pursuant to 10 *Del. C.* § 9903(c) shall be heard on the record. CCP Crim. R. 39(f). When addressing appeals from the J.P. Court this Court sits as an intermediate appellate court. The function of the Court in this capacity is to 'correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.' *State v. Richards*, 1998 WL 732960, *1 (Del. Super.)(citing *Baker v. Connell*, 488 A.2d 1303 (Del. 1985). Therefore, the Court must apply a *de novo* standard of review to the lower court's

legal determinations and a clearly erroneous standard to findings of fact. *State v. Arnold*, 2001 WL 985101, *2 (Del. Super.).

The State argues that the J.P. Court inappropriately relied on information outside of the record, and applied the wrong legal standard in its decision on the Defendant's motion to suppress. Accordingly, the first question presented is whether the J.P. Court erred when it considered facts that were not in evidence. The second question at issue is whether the J.P. Court erred when it decided that the Officer did not have probable cause to arrest the Defendant.

The J.P. Court Inappropriately Relied on Facts Not in Evidence

The transcript reflects that as the J.P. Court considered the evidence admitted for purposes of establishing probable cause, the court enlarged the record with its own personal knowledge. The sole witness at the hearing, the Officer who administered the tests, provided that the testing area was grassy, with a slight grade, but hard, not muddy and not rocky. However, upon ruling on the motion, the Court interjected its own knowledge of the area and disregarded the Officer's testimony. Specifically, when determining the probative value of the walk and turn test and the one leg stand test, the court spoke as to its personal knowledge of the roadway. The court noted that the tests were improper because they were conducted,

> "on the side of a road, on a road that I know, and everyone else in Sussex County, knows it is not only a grass shoulder road but a very tapered grass shoulder road into a heavy ditch in low lying swamp ground. We know what that road is. We know why they call it a Nine Foot Road. It was a miraculous piece of construction when they put that concrete road on that piece of road on 26 because it is a low lying piece of swamp that was drained off to put into agriculture. I mean I know all these things. And this is not the place to do that test."

Because the facts depended on by the J.P. Court were not admitted into evidence, the question arises whether reliance on those facts constituted error. The Delaware Rules of Evidence provide that courts are permitted to take judicial

notice of an adjudicative fact. D.R.E. 202. However, courts may only take judicial notice of a fact that is not subject to reasonable dispute in that it either is generally known within the territorial jurisdiction of the court, or it is capable of accurate and ready determination in sources whose accuracy cannot reasonably be questioned. D.R.E. 202(b). The doctrine of judicial notice should be applied with due care because if there is even a mere possibility of dispute as to whether the fact asserted is accurate, or of common knowledge, judicial notice is inappropriate and evidence is required to establish the fact. *Fawcett v. State*, 697 A.2d 385, 388 (Del. 1997).

Although the court stated that "everyone in Sussex County, knows [the area] is not only a grass shoulder road but a very tapered grass shoulder road into a heavy ditch in low lying swamp ground," the Officer's contrary testimony wherein he described the testing area as grassy, with a slight grade, but hard, not muddy and not rocky indicates that the conditions of that area at the time of administration were indeed subject to reasonable dispute. The court did not indicate that it determined the Officer was untrustworthy. Rather, the court relied solely on its own opinion of the conditions that may or may not have been present in the testing area to discredit the tests. The court's opinion is therefore not an adjudicative fact. Accordingly, I find that the J.P. Court committed plain error when it relied on evidence that was outside of the record in its decision finding that the Officer did not have probable cause to arrest the Defendant.

Probable Cause Existed

The State argues that the court improperly "diluted each [of the Officer's probable cause] observation[s] with hypothetically innocent explanations and then rejected them," without considering the Officer's observations under the totality of the circumstances. (Appellant Open. Brief at 15.) Thus, the State contends that the court applied the inappropriate legal standard in determining that the Officer did not have probable cause to arrest. Because the determination of probable

cause is a question of law, the Court will review this matter *de novo*. *See State v. Maxwell*, 624 A.2d 926 (Del. 1989).

The Delaware Supreme Court has held that an officer has probable cause to arrest for a violation of DUI when the officer 'possesses information which would warrant a reasonable man in believing that such a crime has been committed.' *Maxwell* at 929-930 (citing *Clendaniel v. Coshell*, 562 A.2d 1167, 1170 (Del. 1989). It is inappropriate for a trial court to discount the probative value of an officer's probable cause observations because the officer did not eliminate possible innocent explanations for the existence of those observations. *Id*. at 930. In determining whether probable cause existed, courts are required to determine whether the totality of the circumstances presented reveal that "based upon their observations, their training, their experience, their investigation, and rational inferences drawn therefrom, the police possessed a quantum of trustworthy factual information, sufficient in themselves to warrant a man of reasonable caution to conclude that probable cause existed to believe" that the defendant committed the offense. *Id*. I will address each of the facts and circumstances presented on the record to determine whether the J.P. Court applied the appropriate legal standard in its probable cause analysis.

The Court is sympathetic to the State's argument that the J.P. Court again improperly applied the doctrine of judicial notice by supplanting the evidence with its personal technological knowledge when it considered the probative value of the PBT. However, the State failed to introduce the results of the PBT. This is an appeal on the record. Thus, this Court cannot consider nor imply the results of the PBT test because the results were not before the court below. *See* CCP Crim. R. 39(f).

The State also argues that the J.P. Court erroneously determined that the HGN test had little probative value. Specifically, the court determined that the HGN test would not be weighted heavily because it was uncertain whether the nystagmus was caused by alcohol consumption or some other factor. The record

also showed that the officer may not have followed the testing procedure correctly as required by the NTSHA manual. Prior to the court's evidentiary ruling, the Officer testified that the presence of strobe lights, flashing lights and moving traffic in close proximity are alternative factors that could cause nystagmus. Furthermore, the Officer testified that all three factors were present when he administered the HGN test. The State argues, that the court's consideration of these factors constituted reliance on hypothetically innocent explanations, which contradicts the law provided in *Maxwell*.

The State accurately provides that the finding of probable cause is not dependent upon the elimination of all innocent explanations for facts observed by the arresting officer. *Maxwell* at 930. In *Maxwell*, the Delaware Supreme Court held that the trial court committed error when it discounted each of the officers' observations because the officers failed to investigate possible innocent theories for the observations. *Id*. However, this rule of law does not strip courts of their responsibility to weigh the probative value of evidence presented by looking at all of the facts and circumstances within the Officer's actual knowledge. In the instant case, the J.P. Court relied on the Officer's observations relating to other relevant factors, rather than hypothetically innocent explanations, to weigh the probative value of the test. Specifically, the court weighted the presence of strobe lights, rotating lights and proximate moving traffic in its probative value analysis. Such consideration was wholly within the province of the court. However, for purposes of determining probable cause, the court should have reviewed the HGN results as one factor under the totality of the circumstances.

As discussed *supra*, the J.P. Court erroneously discredited the Officer's observations with respect to the walk and turn and one leg stand tests based on its own personal knowledge of the roadway where the tests were administered. Accordingly, only the actual evidence presented in the record below may be considered on appeal. The record reveals that throughout the duration of the explanation and performance of the tests, the Defendant exhibited an inability to

follow direction as well as several indications that he was having trouble maintaining his balance.

In addition to the foregoing factors that are relevant for purposes of determining probable cause, the J.P. Court also admitted evidence that the Defendant failed to follow instructions and performed poorly on the alphabet and counting tests. Additionally, before the Officer administered the tests, he observed a number of other facts and circumstances that tended to show that the Defendant may have committed DUI. Namely, the Defendant had rosy cheeks, bloodshot eyes, omitted a moderate odor of alcohol and admitted to consuming two beers earlier in the day and was speeding. Each of these factors should have been considered under the totality of the circumstances.

The Defendant argues that the Officer also observed several factors that tended to negate the probability that he had committed DUI. Specifically, the Officer testified that upon initiating the stop, the Defendant appropriately pulled his vehicle to the shoulder of the road. Additionally, upon the Officer's approach of the Defendant at his vehicle, the Defendant's clothing appeared orderly, he spoke well and he did not exhibit any trouble producing his license or registration, nor did he appear to have trouble exiting his vehicle upon the Officer's request. Despite these observations, I find that in light of all the facts and circumstances known to the Officer at the time of arrest, he possessed a quantum of trustworthy factual information, sufficient in themselves to warrant a man of reasonable caution to conclude that probable cause existed to believe that the Defendant committed DUI.

In conclusion, the Officer made the following observations of the Defendant (1) blood shot eyes, (2) rosy cheeks, (3) moderate odor of alcohol, (4) admission of consuming alcohol, (5) failure to follow instruction and properly perform the alphabet, counting and walk and turn tests, (6) trouble maintaining balance on the walk and turn and one leg stand tests, (7) several clues present upon application of the HGN test and (8) Speeding. Case law suggests that such factors

are adequate to establish probable case. *See Bease v. State*, 884 A.2d 495, 498 (Del. 2005)(holding that the police had probable cause when the defendant drove abruptly, had bloodshot, glassy eyes, his breath omitted an odor of alcohol and he admitted to consuming beer or chardonnay the night before); *see also Perrera v. State*, 852 A.2d 908 (Del. 2004)(opining that the officer had probable cause when the defendant drove erratically, smelled of alcohol, had bloodshot eyes, admitted to consuming alcohol and beer cans were plainly visible in the defendant's car). Despite the other factors within the Officer's knowledge that could have minimized the probability that the Defendant committed DUI, when the evidence is viewed under the totality of the circumstances, the Officer had sufficient information to warrant probable cause to arrest.

CONCLUSION

This Court concludes that the J.P. Court inappropriately relied on facts not in evidence. Furthermore, this Court finds that the Officer had probable cause to believe that the Defendant had been driving under the influence when he arrested the Defendant. Thus, the Court hereby reverses the J.P. Court's decision on the Defendant's motion to suppress and remands the case for further proceeding consistent with this Order.

IT IS SO ORDERED, this ____ day of June 2006.

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The Honorable Rosemary Betts Beauregard